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Supreme Court of the United States

OCTOBER TERM, A.D. 1955.

No. [redacted] 112

ROSE ROSENBLUM, EDWARD ROWE and HARRIET R. WISE, as Trustees under a Trust Indenture dated November 23, 1942,

Petitioners,

vs.

NEISNER BROS., INC.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A.D. 1955.

No.

ROSE ROSENBLUM, EDWARD ROWE and HARRIET R. WISE, as Trustees under a Trust Indenture dated November 23, 1942,

Petitioners,

vs.

NEISNER BROS., INC.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Rose Rosenblum, Edward Rowe, and Harriet R. Wise, as Trustees under a certain Trust Indenture dated November 23, 1942, pray that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Seventh Circuit, entered on February 21, 1956.

OPINIONS BELOW.

The District Court did not render a formal opinion but filed Findings of Fact and Conclusions of Law, which are set forth in full in Appendix A to this petition, *infra* p. 1a. The opinion of the Court of Appeals is as yet

unreported, but is also set forth in full in Appendix B to this petition, *infra* p. 6a.

JURISDICTION.

The judgment of the Court of Appeals for the Seventh Circuit reversing the judgment of the United States District Court for the Northern District of Illinois, Eastern Division, was entered on February 21, 1956, *infra* p. 6a. A petition for rehearing and a petition of the Chicago Real Estate Board for leave to file a brief as *amicus curiae* were denied on April 4, 1956, *infra* pp. 18a, 19a. The jurisdiction of this Court is invoked under 28 U.S.C.A. Sec. 1254 (1). Petitioners pray a review on writ of certiorari on the ground that the Court of Appeals has decided an important question of state law in a way in conflict with *all* applicable state law.

QUESTIONS PRESENTED.

1. Whether a provision in a lease granting a tenant "the right to make alterations and changes in any part of the premises occupied by it" authorizes the tenant to construct an additional floor on the building demised?

2. Whether in the absence of a pertinent decision by the Courts of the State in which the controversy arises, a Court of Appeals, in construing a lease, may decide a question of landlord and tenant law in a manner in conflict with *all* applicable opinions on the subject rendered by the courts of other states.

STATEMENT OF THE CASE.

The instant cause was instituted in the United States District Court for the Northern District of Illinois, Eastern Division. Jurisdiction was based on diversity of citizenship under 28 U.S.C.A. 1332, and a declaratory

judgment was prayed under the provisions of 28 U.S.C.A. 2201.

The petitioners, as Trustees under a certain Trust Indenture dated November 23, 1942, are the owners of the premises commonly known and described as 6-8 North Genesee Street and 206 Washington Street in the City of Waukegan, Illinois. The respondent is the lessee for a term of twenty-five years and five years of the said premises under a lease dated June 1, 1943 (R. 7-14). This instrument provides, among other things, as follows:

> "Lessee shall have the right to make such alterations and changes in any part of the premises occupied by it as it finds necessary for its purpose at its own expense, provided such alterations will not injure the building, and must be done in a first class workmanlike manner. Lessee agrees to restore the premises to the same condition as when received, if Lessors so desire and give at least three (3) months notice to effect before the expiration of the term of this Lease." (R. 13)

As will be seen below, similar or identical language is commonly used in long term leases throughout the country.

Prior to July of 1952 the premises consisted of a two-story "L" shaped building, in part on Genesee Street and in part on Washington Street (R. 29, 66-67, 99). In July and August of 1952 the respondent, without the petitioners' consent and without notice to them, proceeded to add a third floor to a portion of the structure. This addition was allegedly for the purpose of providing needed storage space. Upon learning of the addition, the petitioners immediately objected on the ground that it was not authorized under the language quoted, absent their consent.

Previously, despite the authority granted in the paragraph quoted, the respondent had always solicited the petitioners' approval of any substantial alterations contemplated (R. 81). On August 28, 1952, the respondent wrote a letter to one of the petitioners reading in part as follows:

> "First of all, I wish to apologize for not having notified you of the work now underway at our Waukegan store. We spent several months discussing the possibility of gaining additional stock space, and finally decided several weeks ago that we should go ahead with it and make it available to the store for the Fall Season of 1952. In our rush to get the job started, we simply neglected to extend you the courtesy of telling you of our plans.

Shortly thereafter the petitioners instituted the instant cause praying for a declaratory judgment and for other relief. After a full trial, the trial judge found that the petitioners were entitled to a declaratory judgment to the effect that the respondent had no right to do the construction work described and finding further that:

> "The right to make 'alterations' and 'changes' set out in the said lease, did not carry with it the right to make 'additions'; the construction work in 1952 was not an 'alteration' or 'change' in the demised premises, within the meaning of the provisions of the said lease, but was an 'addition' constructed outside the premises, above the second floor, adding in effect another story to the building and not authorized by the terms of the said lease."

The Court of Appeals disagreed with this conclusion and reversed. The petitioners filed a petition for rehearing pointing out that this result was not supported by a single landlord and tenant case in any jurisdiction of the United States, and the Chicago Real Estate Board filed a motion

for leave to submit a brief as *amicus curiae* alleging, among other things, the following:

> "(a) the decision will affect the rights of the vast majority of property owners who lease property, particularly commercial and industrial property, within the City of Chicago and throughout the State of Illinois;
>
> "(b) the decision is contrary to the generally accepted concept of the words 'alterations' and 'changes' in that it adds to their connotation a meaning not normally attributed to these words by persons engaged in the real estate business;
>
> "(c) the Board has incorporated the words 'alterations' and 'changes' into a lease that it has prepared for its members and has made available to the public, and may be called upon in the future to support the position advanced by the Plaintiffs-Appellees herein. Said decision may be the occasion for future litigation and may be embarrassing precedent to support unjust results in such litigation."

The petition and the motion were both denied.

REASONS FOR ALLOWANCE OF WRIT.

A review on writ of certiorari is prayed on the ground that the Court of Appeals has decided an important state question in a way in conflict with *all* applicable state law. Supreme Court Rule 19 (b); *Erie Railroad Company* v. *Tompkins,* 304 U.S. 64 (1938).

A. The decision conflicts with all state decisions in the field of landlord and tenant law.

The Court of Appeals succinctly summarized the question before it as follows:

> "The plaintiffs' chief contention in this appeal is that the provisions of the lease which authorized 'al-

terations' and 'changes' in the building by the tenant did not permit 'additions' to the building such as the construction of the additional storage unit in 1952. We agree with the plaintiffs that if the lease did not authorize this construction work, such work constituted waste, and the fact that it enhanced the value of the plaintiffs' property does not constitute a defense."

The Court of Appeals concluded that the words "alterations" and "changes" did authorize the "addition" of a third floor to the petitioners' building. This result is not supported by a single pertinent State Court decision. Every relevant case in the field of landlord and tenant law has held that the words "alterations" and "changes" refer to modifications "*within* the superficial limits of an existing structure." (Italics supplied). *Brill* v. *Miller,* 125 N.Y.S. 865, 140 App. Div. 602 (1910). This definition has never been varied to include external "additions" of any kind or nature. Every State Court which has considered the question has drawn a sharp distinction between "alteration" and "change", on the one hand, and "addition", on the other. *Grosse* v. *Barman,* 9 Cal. App. 650, 100 Pac. 348 (1909); *Emmons* v. *A. D. Shulte, Inc.,* 13 Del. Ch. 336, 120 Atl. 221 (1923); *Lovell* v. *Mt. Vernon,* 215 Ky. 143, 284 S.W. 1025 (1926); *Commonwealth* v. *Hayden,* 211 Mass. 296, 97 N.E. 783 (1912); *Kresge* v. *Maryland Casualty Company,* 154 Wis. 627, 143 N.W. 668 (1913); *Brill* v. *Miller,* 125 N.Y.S. 865, 140 App. Div. 602 (1910); *Cole* v. *City of Battle Creek,* 298 Mich. 98, 298 N.W. 466 (1941); *Noyes* v. *Rothfeld,* 78 N.Y.S. (2d) 433, 191 Misc. 672 (1947). See definition of "addition" in *Mack* v. *Eyssell,* 332 Mo. 671, 59 S.W. (2d) 1049. Indeed, there is not a single landlord and tenant case to be found in the annals of American jurisprudence which holds that "alteration" and "change", on the one hand, and "addition", on the other, are in any way synonymous or inter-

changeable. Neither the respondent in its briefs below nor the Court of Appeals in its opinion was able to cite any. Although there is no Illinois case in point, the practice in this State has always been to differentiate between these words. *County of Cook* v. *Harris,* 108 Ill. 151, 157-159 (1883). The Court of Appeals observes in its opinion that the words "alteration", "change", and "addition" have been variously defined by our courts, but it was unable to cite even one landlord and tenant case in which the scope of the words "alteration" and "change" was extended to include additions to the building.

The decision of the Court of Appeals is based on *Fehr Construction Co.* v. *Postl System,* 288 Ill. 634, 642, 124 N.E. 315 (1919), and *Updike* v. *Skillman,* 27 N.J.L. 131 (1858), both of which involved the construction of mechanics lien statutes and both of which are on their face completely irrelevant to a landlord and tenant controversy. In the *Updike* case the statute provided that "any addition erected to a *former* building . . . shall be considered a building." The New Jersey court, in commenting on this language, said that an "addition erected to a 'former building', to constitute a *building* within the meaning of the mechanics lien law . . . must be a lateral addition." (Italics supplied). From this language, based on the special and peculiar statute under consideration, the *Court of Appeals drew the illogical deduction that in a landlord and tenant case "addition" means only a lateral addition, and that a vertical addition such as the third floor which is the subject matter of this cause is an alteration or change!* It is respectfully submitted that this view does violence to common sense, to semantics, and, above all, to the law. See *Lamson* v. *Maryland Casualty Co.,* 196 Iowa 1185, 194 N.W. 70 (1923) in which an eighth floor constructed on top of a seven story building was held to be an "addition".

The Court of Appeals quotes as follows with approval from *Fehr Construction Company* v. *Postl System,* 288 Ill. 634, 642, 124 N.E. 315 (1919):

> "Improvements which add to the height or depth of a building or that change, increase and repair the interior accommodations thereof, are repairs or alterations * * *".

These words at first blush appear to be favorable to the respondent. But a closer examination must lead to a contrary inference. Here again a mechanics' lien statute was being construed. Indeed, the asterisks in the quotation above were substituted for the words "within the meaning of the [mechanics' lien] act." But most important of all, the case contains its own distinction; for the Supreme Court of Illinois was careful to point out that:

> "The rules for determining what are fixtures between landlord and tenant are not applicable between lienor and lienee."

The Court of Appeals did not mention or give any consideration to the leading State case which is directly in point. In *Woolworth Co.* v. *Nelson,* 204 Ala. 172, 85 So. 449 (1920), the court passed upon the following provision of a lease which happens to be almost identical with the one here in controversy:

> "The lessee shall have the right to make such alterations and changes in such parts of the building as it finds necessary for its purpose, * * * providing that such alterations will not injure the building."

Although the modifications of the premises contemplated by the tenant in that case were substantially less drastic and substantial than the addition completed in the instant cause, an injunction against them was granted. Among other things, the court said:

> "Doubtless [these changes] do not injure [the building] from the standpoint of structural safety, and of the feasibility of restoration; but that is not the standpoint of the owner, and it is not the standpoint of the owner, and it is not the standpoint of the law of property rights."

How much more true is this statement when applied to a third floor addition to a two story building? In every instance in which a lease provision granting the right to alter or change has been construed, the authority of the tenant has been limited to minor alterations within the confines of the building demised. *Agate* v. *Lowenbein*, 57 N.Y. 604 (1874); *Woolworth Co.* v. *Nelson*, 204 Ala. 172, 85 So. 449 (1920); *Cohen* v. *Simon Straus*, 139 N.Y.S. 929 (1913); *Western Bldg Co.* v. *J. C. Penney*, 60 S.D. 630, 245 N.W. 909 (1932); *Davenport* v. *Magoon*, 13 Or. 3, 4 Pac. 299 (1884).

Having no Illinois decision to guide it, the Court of Appeals chose to disregard all of the landlord and tenant cases decided in other States. In so doing, it created new law in the field of landlord and tenant and it acted in contravention of the principles enunciated by this Honorable Court in *Erie Railroad Company* v. *Tompkins*, 304 U.S. 64 (1938). The effect is injurious not only to the petitioners, but to thousands of other landlords.

B. The question at issue is important.

As is apparent from our examination of many of the authorities cited above, provisions granting tenants the right to make alterations and changes are common. They constitute an almost invariable feature of long term leases to chain stores. *Woolworth Co.* v. *Nelson*, 204 Ala. 472, 85 So. 449 (1920) is typical. The respondent is the owner and operator of approximately one hundred sixty

stores. Obviously the opinion below affects its relationship not only with the petitioners but with the numerous other landlords from whom it rents. By a stroke of the pen its status has been transformed, to all intents and purposes, from that of a lessee to that of an owner of real estate.

But of even greater significance is the effect that the opinion below will have upon the thousands of other leases in existence conferring similar authority to make alterations and change upon tenants. If the decision of the Court of Appeals stands, tenants enjoying the benefits of like clauses and provisions will acquire almost full dominion and control over the premises leased to them. Subject to the tenuous limitations that the addition must be necessary for their purposes, they may add not one but several stories and collect rentals from sub-lessees. The fact that the premises must be restored to their original condition upon the termination of the lease provides cold comfort to the landlord because he has no assurance that the tenant will be solvent or even in existence several years hence. *Bass* v. *Metropolitan West Side E. R. Co.*, 82 Fed. 857 (C.C.A. 7th 1897). *Agate* v. *Lowenbein*, 57 N.Y. 604 (1874).

That the opinion below is a definite threat to the interests of landlords in thousand of cases is clearly indicated by the motion of the Chicago Real Estate Board quoted, in part, in the Statement Of The Cases above. The Board is a not-for-profit organization, has no direct stake in the instant litigation, and has attempted to act as *amicus curiae* on behalf of the real estate estate profession as a whole.

C. Additional considerations.

While they do not in themselves constitute grounds for certiorari, the following facts should be called to the attention of this Honorable Court:

1. The Court of Appeals substituted its own judgment on the credibility of witnesses for that of the trial judge who heard the conflicting testimony. This, of course, was improper under its own prior decisions. *Murray* v. *Chicago St. P. M. & O. Ry. Co.*, 50 F. (2d) 375 (C.C.A. 7th 1931); *Ferguson* v. *Marks*, 96 F. (2d) 910, 915 (C.C.A. 7th 1938).

2. The Court of Appeals in its opinion weighs the testimony of the petitioners' expert witness against that of one of respondent's expert witnesses but does not even mention respondent's other expert witnesses whose testimony contained admissions favorable to the petitioners.

3. The Court of Appeals was undoubtedly influenced by the expressed belief that "the desire of the plaintiffs for more compensation for the additional space was their reason for bringing this action." This conclusion is based upon the offer of the petitioners, prior to the institution of the instant cause, to settle their differences with the respondent by the acceptance of damages in the form of additional rent. Nowhere, however, in the complaint or in the course of any of the hearings below was any demand by the plaintiffs for additional rent asserted or urged. To determine this cause on the basis of what was said in the course of settlement negotiations is to violate one of the basic rules of our system of law. If the Court of Appeals is correct on this score, then why should not every offer of settlement be considered an admission of liability or fault? Such a result, it is respectfully submitted, is clearly against public policy. In any event, it

has never been unlawful for parties to settle their differences on a pecuniary basis.

CONCLUSION.

For the foregoing reasons, the petition for certiorari should be granted.

Respectfully submitted:

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APPENDIX A.

OPINION.

IN THE UNITED STATES DISTRICT COURT
For the Northern District of Illinois
Eastern Division

ROSE ROSENBLUM, EDWARD ROSE and HARRIET R. WISE, as Trustees under a Trust Indenture dated November 23, 1942,
Plaintiffs-Appellees,
vs.
NEISNER BROS., INC.,
Defendant-Appellant
} No. 52 C 2491

FINDINGS OF FACT AND
CONCLUSIONS OF LAW

This action was brought by plaintiffs for declaratory judgment and other relief based on alleged breach of a lease of the demised premises. Defendant contends that no breach has occurred.

The cause came on for hearing before the Court on the pleadings and the evidence, consisting of oral testimony and documentary proofs. Witnesses were called by the respective parties, whose testimony was transcribed in the record. The Court has had the benefit of argument of counsel presented orally and on briefs.

The Court has reviewed the record and briefs of counsel, has weighed carefully the arguments presented and considered the authorities advanced by respective counsel in support of their respective claims.

Upon a consideration of the whole case, the Court makes the following:

FINDINGS OF FACT

1. On June 1, 1943, the plaintiffs, as Trustees under a certain Trust Indenture dated November 23, 1942, leased the premises commonly known and described as 6-8 Genesee Street and 206 Washington Street, in the City of Waukegan, Illinois, to the defendant under the terms of a written lease for a period of twenty-three years and five months; the said lease provided, among other things, as follows:

> Lessee shall have the right to make such alterations and changes in any part of the premises occupied by its as it finds necessary for its purpose at its own expense, provided such alterations will not injure the building, and must be done in a first class workmanlike manner. Lessee agrees to restore the premises to the same condition as when received, if Lessors so desire and give at least Three (3) months notice to effect before the expiration of the term of this Lease.

2. The said lease also contained the following provision:

> If, however, the Lessee shall violate any of the covenants and agreements in said lease, and the Lessee shall continue to violate such covenant or agreement of this lease for Ninety (90) days after written notice given by Lessors to Lessee, notifying the Lessee that it is violating the lease and specifying the provision of said lease as to which a violation exists and compelling the Lessee to comply with the lease or vacate the premises, then and in either of the foregoing events, Lessors may end the term of this lease by giving the Lessee Thirty (30) days written notice, by registered mail, addressed to the home office of the corporation at 49 East Avenue, Rochester, New York.

3. The premises consist of a two-story commercial building.

4. In 1945-47, defendant made substantial alterations and changes in the building which cost in excess of $200,000 and consisted of knocking out the north walls of the first floor and basement, thus merging these floors with the adjacent building to the north; relocated staircases, rearranged plumbing and toilet facilities; made openings in the floors, relaid basement floor; installed new electric wiring; and installed a new ventilating and heating system. The plaintiffs had no objection to these alterations and changes.

5. In 1948, defendant erected a 23′ x 36′ x 11′ (approximate measurements) structural steel and concrete block, fire resistant penthouse on the roof of the premises fronting on Genesee Street, for the housing of air-conditioning machinery. The plaintiffs had no objection to construction of this penthouse on the roof of their building.

6. In 1952, defendant erected a 28′ x 50′ x 10′ (approximate measurements) structural steel, face brick and concrete block, fire resistant unit, which occupied one-third of the roof of the premises fronting on Washington Street. This unit was constructed by defendant for the purpose of creating additional storage space in the demised premises. This construction was made without plaintiffs' consent and without notice to them. Plaintiffs characterize this construction as an "addition" unauthorized by the terms of the said lease.

7. The construction work in 1952, described above, was said for by the defendant, was built for storage purposes, with unplastered, exposed masonry walls, without water outlets, without toilet facilities, and with only one small window at the rear for ventilation.

8. The testimony was in conflict as to whether the construction enhanced or depreciated the value of the building. Various factors entered into the expert opinions expressed including, among other things, outward appearance as affected by a difference in color between the face brick on the new construction and the original building, removal of stone urns and lattice-work trim, and interference with the proportions of the facade design; decrease in space previously available on the second floor entailed by installation of a stairway to the new construction and a conveyor belt; and possible compensation for the loss by added space above, considering the difficulty of access and inconvenience of lay-out. From a consideration of all the evidence, it appears that the construction work in 1952 did not enhance the market value of the demised premises but depreciated it, at least from an esthetic view.

9. The construction work in 1952 cost the defendant in excess of $10,000, and its removal will involve an expenditure of approximately the same amount.

10. Plaintiffs have established the jurisdictional amount of $3000 in controversy by a preponderance of the evidence.

11. The construction work in 1952 changed the external form and character of the demised premises.

12. Plaintiffs' claim for $100,000 in damages has not been supported, no evidence having been offered to prove the amount of damages allegedly sustained.

CONCLUSIONS OF LAW

1. The right to make "alterations" and "changes," set out in the said lease, did not carry with it the right to make "additions"; the construction work in 1952 was not an "alteration" or "change" in the demised premises,

within the meaning of the provisions of the said lease, but was an "addition" constructed outside the premises, above the second floor, adding in effect another story to the building, and not authorized by the terms of the said lease.

2. Plaintiffs are entitled to a declaratory judgment to the effect that defendant herein had no right to do the construction work described above, under the terms of the said lease, absent express consent of the plaintiffs.

A draft order in conformity with the foregoing may be presented to the Court within five days.

Win G. Knoch
United States District Judge

Date: April 27, 1955.

APPENDIX B.

IN THE UNITED STATES COURT OF APPEALS
For the Seventh Circuit

No. 11530 OCTOBER TERM, 1955—JANUARY SESSION, 1956.

ROSE ROSENBLUM, EDWARD ROWE and HARRIET R. WISE, as Trustees under a Trust Indenture dated November 23, 1942,
Plaintiffs-Appellees,
vs.
NEISNER BROS., INC.,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

February 21, 1956.

Before DUFFY, *Chief Judge*, MAJOR and SWAIM, *Circuit Judges*.

SWAIM, *Circuit Judge*. The plaintiffs, Rose Rosenblum, Edward Rowe and Harriet R. Wise, as trustees, on December 1, 1944, leased to the defendant, Neisner Bros., Inc., for a period of 23 years and five months a part of Lots 5 and 6 in Block 18 in the City of Waukegan, Illinois. On the land so leased there was an L-shaped store building known as 6-8 Genesee Street and 206 Washington Street, Waukegan, Illinois. This was a two story and loft type of building. The agreed rental was at the rate of $21,258.00 per year for the first ten years of the term and at the rate of $18,069.00 per year for the remainder of the term, said rental to be paid on a monthly basis. As additional rental

the lessee agreed to pay all taxes, assessments and water rents assessed against the premises and to keep the premises insured against fire and other hazards. At the time of the execution of this lease the defendant was in possession of these premises under the terms of a former lease which was executed February 4, 1928.

The plaintiffs' complaint charged that in July, August and September of 1952, the defendant, without notice to or the consent of the plaintiffs, constructed a third floor addition on a portion of the building on the leased premises; that said addition did not conform to the original architectural design of the premises; and that plaintiffs, on learning of the addition, protested and objected to the defendant, but that defendant denied that it had violated the lease and insisted that it had the right to so change or alter the building under the language of the lease, which expressly provided that:

> "Lessee shall have the right to make such alterations and changes in any part of the premises occupied by it as it finds necessary for its purposes, at its own expense, providing such alterations will not injure the building, and must be done in a first-class workmanlike manner. Lessee agrees to restore the premises to the same condition as when received, if Lessors so desire and give at least Three (3) months notice to [that] effect before the expiration of the term of this lease."

The complaint further charged that the addition to the building was of the cheapest possible construction and tended to depreciate the value of the premises; that in so constructing the addition to the building the defendants committed waste and breached the lease; that unless a decree was entered terminating the lease and directing the defendant forthwith to remove the addition, the plaintiffs

would suffer irreparable damages; and that plaintiffs were entitled to monetary damages in the amount of $100,000.00 for breach of the lease and for injuries to the premises by the defendant.

Defendant's answer alleged that the construction of a third floor on part of the building was expressly permitted by the above quoted provision of the lease relating to the right of the lessee to make alterations and changes in the premises; and that, in the alternative, plaintiffs had waived any right to notice of any alterations and changes, including additions, by their prior conduct in not insisting on notice and in failing to complain of extensive alterations, changes and additions to the premises which the defendant had made in 1946 and 1947 and at various times thereafter.

In its answer the defendant also quoted a provision of the lease which states that, in case of a violation of the terms of the lease by the lessee for 90 days after receipt of written notice by the lessors of such violation, the lessors may then cancel the lease by giving the lessee 30 days written notice, by registered mail addressed to the home office of the lessee. Defendant's answer alleged that no notice of a violation of the lease was given by the lessors, and that this action by the plaintiffs was therefore premature.

The District Court found that the defendant, in 1952, "erected a 28′ x 50′ x 10′ structural steel, face brick and concrete block, fire resistant unit, which occupied one-third of the roof of the premises fronting on Washington Street." The court found that the defendant constructed this unit for the purpose of creating additional storage space in the leased premises, and that this construction was without notice to or the consent of the plaintiffs. The

trial court concluded that the above described construction was not an "alteration" or "change" permitted by the terms of the lease, but was an "addition" not authorized by the lease and amounted to adding another story to a part of the building.

The court further found that the construction work by the defendant in 1952 did not enhance the market value of the demised premises but depreciated it, "at least from an esthetic view." The court also found that the plaintiffs' claim for damages had not been supported, "no evidence having been offered to prove the amount of damages allegedly sustained."

In their brief in this court the plaintiffs state, page 14: "At the trial the plaintiffs offered no evidence of pecuniary damages and abandoned that portion of their prayer. They expressly limited the relief requested to a declaratory judgment and to a mandatory injunction." We find nothing in the record to indicate such a change of heart until after the trial below. There was no such amendment by the plaintiffs of their complaint.

In the trial the plaintiffs offered the testimony of Elton Vick, a real estate broker and appraiser, in an attempt to show that the value of the building had been decreased by the construction of the storage space. Vick was asked if he had an opinion as to whether such construction appreciated the value of the building. He first answered, "No." But when the question was repeated he said: "Yes, I have my own opinion. * * * My opinion is that it detracts from the building as far as the *outward appearance* is concerned, and it adds nothing to the building in value." (Our emphasis.) In explaining the reasons for this opinion he described the appearance of the *inside* of the storage space. When asked whether in his opinion the

storage space was constructed in a workmanlike manner, Vick said: "I will say that the construction work is sturdy, but it isn't finished off to be of any use other than what it is used for." In answer to a further question as to whether in his opinion the storage space "adds or detracts from the rental value of the building as a whole," Vick said: "It detracts from the building and the space, to me, is not large enough for a building of that size to add any particular value." He also said that the stair case and conveyor belt going up to the storage unit used a certain amount of space on the second floor. Mr. Vick did admit that the 1400 square feet of additional storage space was beneficial to Neisner Bros., and was built because the defendant needed more storage space. But he said he could "see no uses to the landlord" of that additional 1400 square feet of storage space and thought it was "a gamble" as to whether the landlord would be able to get more rent because of the additional space. Finally, in answer to a question as to whether the additional storage space had decreased the rental value or capital value of the property, he said, "I can't say that it has increased it any"; and to a question as to whether it had decreased it any, he said, "Well, if I was appraising it, I think I would throw this additional in for nothing."

As we shall show, the opinion of this witness as to the question of whether the additional storage space increased the rental value of the property was diametrically opposed to the opinion of the plaintiffs. Vick's testimony on this point was also flatly contradicted by the defendant's expert witness, Mr. Olson, who testified without any equivocation or evasion that the added 1400 square feet of storage space increased both the rental value and the capital value of the property.

In the proposed findings of fact tendered by the plaintiffs below there was a suggested finding that: "The said addition was not constructed in a workmanlike manner and tended to depreciate rather than enhance the value of the premises * * *." Thus we see that the plaintiffs throughout the trial were insisting on their contention that the value of the building had been depreciated and that they were entitled to damages. The trial court failed to find, as contended by plaintiffs, that the addition "was not constructed in a workmanlike manner," and the court's failure to so find for the plaintiffs must be taken as a finding against them on their contention that even if the lease gave the defendant the right to so alter the premises, the construction was not done in a workmanlike manner and therefore, violated the provision of the lease.

It is true that the trial court found that this construction work was paid for by the defendant and that the unit was built for storage purposes, with unplastered, exposed masonry walls, without water outlets or toilet facilities, and with only one small window at the rear for ventilation; but the court did not find that such construction was not perfectly satisfactory for storage space, the purpose for which the additional unit was built, and therefore space to which customers were not invited. Of course, if the defendant, as it contends, was given the right by the lease to make such a change in the plaintiffs' property, no further consent from the plaintiffs was necessary. We think the defendant was given such a right.

This was a long term lease, given to the tenant which had occupied these premises under a former lease executed February 4, 1928. The second lease was not to expire until April 30, 1968, thus giving the defendant a continuous tenancy of approximately forty years. Under

these circumstances it would seem that any ambiguity in the lease as to how the tenant might change the building to furnish better accommodations for its business must be interpreted in favor of the tenant. This would seem to be especially true where, as here, the lessors were protected against any change in the building which they might not like or approve, by the provision in the lease which required the tenant to restore the premises to the same condition as when received if the lessors should so desire and should give notice of that desire to the tenant at least three months prior to the expiration of the lease.

Shortly after learning of the 1952 alteration of their building the plaintiffs wrote a letter to the defendant protesting that the construction of additional space was not permitted by the lease unless the defendant was willing to pay additional rent. This letter showed very clearly that the plaintiffs' real concern was that the defendant, having increased the rental space and consequently the rental value of the leased property, should be compelled to pay additional rent to the plaintiffs for this additional space, even though the cost of the construction—in excess of $10,000.00—was borne entirely by the defendant. That the desire of the plaintiffs for more compensation for the additional space was their reason for bringing this action is also shown by the following stipulation made by plaintiffs' counsel in the trial. "We will stipulate that had additional compensation been paid to us we would not have filed this suit. There is no question about that."

We must assume from the statements in plaintiffs' letter and from the above statement by plaintiffs' attorney that the plaintiffs were convinced that the additional storage unit built by defendant materially increased the rental value of the leased premises. It is difficult to understand how an alteration, change or addition to a commercial rental prop-

erty such as the one here involved could increase the rental space and thereby increase the rental value without increasing the value of the property.

The fact that the plaintiffs did not actually believe, as they now contend, that the 1952 construction work had decreased the value of their property is shown by a statement made by their attorney in explanation of the materiality of certain evidence which he sought to introduce (record, page 61): "It is material in this sense, your Honor: The argument is going to be made that at the conclusion of the lease they can restore the premises to the former condition, if we so desire, and *we will definitely not so desire* * * *." (Our emphasis.) The plaintiffs, of course, would want the premises restored to their former condition if they actually thought that the construction of the storage space detracted from the value of the building.

The plaintiffs' chief contention in this appeal is that the provision of the lease which authorized "alterations" and "changes" in the building by the tenant did not permit "additions" to the building such as the construction of the additional storage unit in 1952. We agree with the plaintiffs that if the lease did not authorize this construction work, such work constituted waste, and the fact that it enhanced the value of the plaintiffs' property does not constitute a defense. But we cannot agree that this work was not authorized by the lease. We think a fair construction of this lease requires us to hold that the permission by the lessors to make such alterations and changes as the lessee found necessary for its purposes describes the 1952 construction work done by the defendant for the purpose of providing additional storage space.

In their argument on this point the plaintiffs describe an alteration in a building as "a substantial change therein

varying or changing the form or nature of such building without destroying its identity." That definition clearly describes what was done here. Certainly the identity of this building was not destroyed. It remains a commercial, rental building, used for the same purpose after the alteration as before, and still identified as 6-8 Genesee Street and 206 Washington Street in the City of Waukegan, Illinois.

In *Fehr Construction Co.* v. *Postl System*, 288 Ill. 634, 642, 124 N. E. 315 the court said: "Improvements which add to the height or depth of a building, or that change, increase and repair the interior accommodations thereof, are repairs or alterations * * *." The plaintiffs, however, do not agree that the construction here in question constituted an "alteration" in the leased premises, but insist that it was an "addition" to the building and therefore was not authorized by the lease. Plaintiffs say that in defining the word 'addition" the courts have adopted the following definition of that word from Webster's New International Dictionary: "A part added to a building, either by being built so as to form one architectural whole with it, or by being joined with it in some way, as a passage, and used so that one is a necessary adjunct or appurtenance of the other, so that both constitute in use and purpose one and the same building." However, in each of the following cases which were cited by the plaintiffs to support this contention the addition being discussed was not a construction such as he one here involved but was a lateral extension of constuction adjacent to or adjoining the principal building: *Coe* v. *City of Battle Creek*, 298 Mich. 98, 298 N. W. 466; *Lowell* v. *Mount Vernon*, 215 Ky. 143, 284 S. W. 1025; *Mack* v. *Eyssell*, 332 Mo. 671, 59 S. W. 2d 1049.

In *Cole* v. *City of Battle Creek*, the court said, 298 N. W. at page 468: "As used in this ordinance, the word 'alteration' means a change in that which already exists, for it

is impossible to alter that which does not exist. If plaintiff wanted to install a new front on an existing building, such as was done in *Paye* v. *City of Grosse Pointe*, 279 Mich. 254, that might be a permissible alteration. But the erection of two new additions is not a structural alteration of an existing building." But in that case the court was considering the lateral construction on the ground of two new wings which the owner was about to build and attach to his existing greenhouse. In *Lovell* v. *Mount Vernon, supra*, the court was discussing a situation where an old shed adjacent to a main building was being removed and replaced by a new structure. In *Mack* v. *Eyssell, supra*, the lease gave the landlord the right to tear down, rebuild, alter, add to, or otherwise change the existing building by erecting an addition thereto on the adjacent lot or to construct additional stories to the existing building or both. The lease also provided that it should extend to and cover such extensions and additions to the building and further provided for such additional rents as were mutually agreed upon. The addition there involved was built on an adjoining lot and the court held that it was not an addition to the original building because it was not attached to it.

In *Noyes* v. *Rothfield*, 78 N. Y. S. 2d 433, also cited by the plaintiffs, the court properly held that the proposed demolition of an entire building with the exception of two side walls which the landlord intended to use in the construction of a new building could not be considered as an alteration of the old building. We, of course, agree with that holding, but because of the entirely different facts it cannot furnish a usable characterization of the construction in the instant case.

In *Kresge* v. *Maryland Casualty Co.*, 154 Wis. 627, 143 N. W. 668, on which the plaintiffs strongly rely, the Su-

preme Court of Wisconsin held only that the installation of an extra set of doors in each of the entrances to a store, which thereby created a vestibule, was neither an alteration nor an addition within the meaning of an indemnity insurance policy. The court said that the word "addition" as there used "should be held to mean enlargement or extension so as to include additional space." The policy there in question indemnified the insured against loss by reason of injuries suffered by any person on its premises. It is understandable that the court held that the word "addition" as it was there used "should be held to mean enlargement or extension so as to include additional space." "Addition" was used in the policy to limit the liability of the insurer against increasing the risk by the addition of space covered by the policy.

In *Updike* v. *Skillman*, 27 New Jersey Law Reports, 131, 133 (1858), in discussing the meaning of the words, "addition" and "alteration" as applied to a building, the court said of the word "addition": "This is the appropriate and accustomed phrase when speaking of an additional building erected alongside of, and not under or on top of a former building. If one should say he had erected an addition to his house, he would not be understood as saying that he had put a celler under it or a story on top of it." This decision was cited and followed by the Supreme Court of New Jersey in *Lake and Risley Co.* v. *Still, et al.*, 104 N. J. E. 1, 144 Atl. 110.

The final argument of plaintiffs as to the correct interpretation of the clause giving the defendant the right to make changes and alterations was that the power so given was limited to the "premises occupied by it." To support this contention the plaintiffs cite *Western Building Co.* v. *J. C. Penney Co.*, 60 S. D. 630, 245 N. W. 909, and *Cohen, et al.* v. *Simon Strauss*, 139 N. Y. Supp. 929 (N. Y. Sup.

Ct., App. term). It is true that these cases held that the leases authorizing improvements to be made limited such improvements to the premises leased. But in each of those cases the lease covered only a part of the building in which the leased premises were located. In the instant case the lease covered the entire building as well as the ground on which the building was located.

From our examination of the cases cited in the briefs of the parties and from other cases which we have examined and considered we see that the words "change," "alteration," and "addition," when used in reference to a building, have been variously defined in the decisions of our courts. None of these words can be said to so exactly and definitely define a particular type of construction work that the one word, and it alone, can appropriately describe the 1952 construction work here in question. The plaintiffs in their letter to the defendant protesting the 1952 construction work, referred to the construction work on these premises prior to 1952 as "remodeling," and that word has been defined as such changes in a building as to make it practically a new building. Yet the plaintiffs made no objection to all that prior remodeling.

In this case we think there was such ambiguity in the provision of the lease giving the defendant the right to make such changes and alterations in the premises as it found necessary for its purpose that the court must determine the proper interpretation of the lease. The trial court interpreted the lease as not giving the defendant permission for the 1952 construction work. We think that interpretation under all of the facts and circumstances of this case was clearly erroneous. We hold that the defendant under the terms of this lease was permitted to do the 1952 construction work without notice to the plaintiffs

and without obtaining any further consent from the plaintiffs.

In view of our interpretation of this lease, it is unnecessary for us to consider the other questions discussed in the briefs.

The judgment of the District Court is reversed and the cause is remanded with directions to enter judgment for the defendant.

APPENDIX C

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

Chicago 10, Illinois

Wednesday, April 4, 1956

Before

Hon. H. NATHAN SWAIM, Circuit Judge

ROSE ROSENBLUM, EDWARD ROWE, and HARRIET R. WISE, as TRUSTEES, etc.,
Plaintiffs-Appellees,
vs.
No. 11530
NEISNER BROS., INC.,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

On consideration of the motion of the Chicago Real Estate Board, by its attorneys, for leave to file a brief as *amicus curiae*, and the answer thereto of counsel for defendant-appellant, it is ordered that the said motion of the Chicago Real Estate Board for leave to file brief as *amicus curiae* be, and the same is hereby, DENIED.

APPENDIX D

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

Wednesday, April 4, 1956

Before

Hon. F. RYAN DUFFY, Chief Judge

Hon. J. EARL MAJOR, Circuit Judge

Hon. H. NATHAN SWAIM, Circuit Judge

ROSE ROSENBLUM, EDWARD ROWE, and HARRIET R. WISE, as TRUSTEES, etc.,
Plaintiffs-Appellees,
vs.
NEISNER BROS., INC., a Corp.,
Defendant-Appellant.

No. 11530

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

It is ordered by the Court that the petition for a rehearing of this cause be, and the same is hereby, DENIED.

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1955.

No. 975 112

ROSE ROSENBLUM, EDWARD ROWE and HARRIET R. WISE, as Trustees under a Trust Indenture dated November 23, 1942,

Petitioners,

vs.

NEISNER BROS., INC.,

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR CERTIORARI.

FRANK G. MARSHALL,
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Chicago, Illinois,
Attorney for Respondent.

SHERWIN J. STONE,
Of Counsel.

The Scheffer Press, Inc.—ANdover 3-6850

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1955.

No. 975

ROSE ROSENBLUM, EDWARD ROWE and HARRIET R. WISE, as Trustees under a Trust Indenture dated November 23 1942,

Petitioners,

vs.

NEISNER BROS., INC.,

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR CERTIORARI.

OPINIONS BELOW.

The Findings of Fact and the Conclusions of Law of the District Court are set forth in full in Appendix A of petitioners' petition. The opinion of the Court of Appeals is reported at 231 F. 2d 322 (1956) and is also set forth in full in Appendix B of petitioners' petition.

JURISDICTION.

On February 21, 1956, the Court of Appeals for the Seventh Circuit reversed the judgment of the U. S. District Court for the Northern District of Illinois, Eastern Division, and remanded the cause with direction to enter judgment for the respondent. Petitioners' petition for rehearing and a petition of the Chicago Real Estate Board for leave to file a brief as *amicus curiae* were de-

nied on April 4, 1956. Petitioners invoke the jurisdiction of this Court under 28 U.S.C.A. Sec. 1254(1).

Petitioners seek a review on writ of certiorari on the sole ground that the Court of Appeals has decided an important question of state law "in conflict with *all* applicable state law."

QUESTION PRESENTED.

The questions presented in petitioners' petition do not correctly state the issue involved in this case. The sole issue is:

> Whether in view of the facts and circumstances involved, including the previous conduct of the parties, the testimony and the admissions of petitioners and their counsel, the construction work carried out by respondent in 1952 for the purpose of providing additional storage space was authorized under a long term lease granting respondent the right to make such alterations and changes in the premises as it finds necessary for its purpose?

STATEMENT OF THE CASE.

On June 1, 1943, petitioners and respondent entered into a lease for an L-shaped commercial building located at 6-8 Genesee Street and 206 Washington Street, in the City of Waukegan, Illinois. The term of this lease is for twenty-five years and five months. Previously the respondent had occupied the premises under a former lease executed February 4, 1928. The premises demised includes the entire real estate owned by the petitioners and is legally described on Pages 1 and 2 of the lease (R. 8-9). The lease is a net lease to petitioners in that respondent-lessee pays all taxes, assessments, insurance premiums and any other charge or expense in connection with the demised premises (R. 9-10). The provision of the lease directly involved in this suit (R. 13) is as follows:

"Lessee shall have the right to make such alterations and changes in any part of the premises occupied by it as it finds necessary for its purpose at its own expense, provided such alterations will not injure the building, and must be done in a first class workmanlike manner. Lessee agrees to restore the premises to the same condition as when received, if Lessors so desire and give it at least Three (3) months notice to effect before the expiration of the term of this Lease."

In 1945-1947, respondent, pursuant to the provisions of the clause hereinabove referred to, tore out the north walls of the basement and the first floor of petitioners' building, thus incorporating the building owned by petitioners with the adjoining building to the north (R. 49-50). These and other substantial changes cost in excess of $200,000 (R. 82-83).

In 1948 respondent erected a penthouse for the housing of air conditioning machinery on the roof of the second floor of the leased premises (R. 83). This penthouse was built of fire-resistant concrete blocks, structural steel I beams with a metal duct and tar and gravel roof. The original roof was punctured for air ducts and refrigerator coils (R. 94). The dimensions of this unit are approximately 23′x36′x11′. The only petitioner who testified, Edward Rowe, stated that he was never notified of the construction work in 1945, 1947 and in 1948, but that he knew the work was performed and completed and that he had no objection to the performing of the work at those times and has no objection even now (R. 50-51).

In July, 1952, respondent found it necessary to relocate certain storerooms and to create extra storage space for merchandise and inventory. Therefore respondent constructed a unit for extra storage space on the roof of the second floor of the leased premises. This unit measured

28′x50′x10′ and was also built of fire resistant concrete blocks, face brick, steel I beams and steel joists, with a metal roof duct and a tar and gravel roof (R. 83-86). The appearance, height and type of construction was identical to the penthouse which was constructed by respondent in 1948 and without objection by petitioners.

Shortly after learning of the 1952 construction, the petitioners wrote a letter to the respondent (R. 102) protesting that the construction of additional space was not permitted by the lease unless the respondent was willing to pay additional rent. When the respondent refused to accede to petitioners' unreasonable demands, petitioners instituted the instant suit.

Their complaint charged that the construction of the extra storage space was of the cheapest possible construction and depreciated the premises; that respondent had committed waste and breached the lease; that unless a decree was entered terminating the lease and directing the respondent forthwith to remove the damages, the petitioners would sustain irreparable damages; and that petitioners were entitled to $100,000 damages for breach of lease and for injury to the premises by the respondent (R. 6). The respondent's answer alleged that the construction of the extra storage space was expressly permitted by the above quoted provision of the lease relating to the right of the lessee to make alterations and changes in the premises; and that in the alternative, respondent was not required to obtain petitioners' consent to the construction work of 1952 because petitioner had permitted similar and even more extensive construction work by respondent in 1945, 1947, 1948, all without prior consent on the part of petitioners (R. 20).

The trial court held that the petitioners were not entitled to any damages and also held against the petitioners

on their contention that the construction was not done in a workmanlike manner. The trial court also refused to enter a decree terminating the lease but did enter a declaratory judgment to the effect that the respondent did not have the right to carry out the construction work of 1952 (App. A, pp. 2a-5a).

The Court of Appeals for the Seventh Circuit reversed and remanded the cause with directions to enter judgment for the respondent. It held that the construction of the additional storage space increased rather than depreciated the value of petitioners' property; that the construction was carried out in a workmanlike manner; that such construction was perfectly satisfactory for use by respondent for storage space; that the respondent was given the right by the lease to make such a change in the petitioners' property and that prior consent of petitioners was not necessary. The Court of Appeals further held that the real motive for this law suit was not based on any damage to petitioners, but to exact additional rental income from the respondent. On this point, the Court of Appeals cited correspondence from petitioners to respondent, the testimony of petitioners, the statements of petitioners' counsel in open court, and the evidence presented by both parties (App. B, pp. 9a-13a).

Petitioners filed a petition for rehearing and the Chicago Real Estate Board filed a motion for permission to submit a brief as *amicus curiae*. After full consideration, both motions were denied.

REASONS WHY A WRIT OF CERTIORARI SHOULD NOT BE GRANTED.

A. There is no proper ground for granting a petition for certiorari.

Petitioners' prayer for the issuance of a writ of certiorari is not predicated on a Federal question being involved or a conflict in the decision of the various Courts of Appeal. Nor is it based on the charge that the Court of Appeals for the Seventh Circuit departed from the accepted and usual course in this case. Petitioners admit that their sole ground for review on certiorari is the claim that the Court of Appeals has allegedly decided a question of landlord and tenant law "in conflict with *all* applicable opinions on the subject rendered by the courts of other states."

If no sweeping rule of landlord-tenant law has been enunciated, or if there is no conflict with "*all* applicable state law," petitioners' argument for the issuance of a writ necessarily falls and the writ must be denied.

Respondent's argument in this first portion of its brief will establish two points: (1) this decision does not create a new precedent in the field of landlord-tenant law; and (2) there is no conflict with "*all* applicable opinions rendered by state courts."

1. This decision does not create a new precedent in the field of landlord-tenant law.

Basically this case is a simple one involving the judicial interpretation of a particular, unique lease between the petitioners, as landlord, and respondent, as tenant. The instant lease is not a printed form, thus affecting thousands of other existing leases, as petitioners imply. The instant lease was specifically drafted by the parties involved to govern their own particular relationship.

Respondent has conducted its business in petitioners' premises since 1928. The lease involved in this litigation does not expire until April 30, 1968, thus giving respondent a continuous tenancy of approximately forty years. As the Court of Appeals stated:

> "Under these circumstances it would seem that any ambiguity in the lease as to how the tenant might change the building to furnish better accommodations for its business must be interpreted in favor of the tenant. This would seem to be especially true where, as here, the lessors were protected against any change in the building which they might not like or approve, by the provision of the lease which required the tenant to restore the premises to the same condition as when received if the lessor should so desire and should give notice of that desire to the tenant at least three months prior to the expiration of the lease." (App. B, p. 12a).

In order to create an issue for review by this Court, petitioners have presented an improper, distorted version of the instant lease. Their chief contention is that the provision of the lease which authorized "alterations" and "changes" in the building by the tenant did not permit "additions" to the building such as the construction of the additional storage unit in 1952. However, the Court of Appeals summarily rejected this contention, stating:

> ". . . We cannot agree that this work was not authorized by the lease. We think a fair construction of the lease requires us to hold that the permission by the lessors to make such alterations and changes as the lessee found necessary for its purposes describes the 1952 construction work done by the defendant for the purpose of providing additional storage space." (App. B, p. 13a).

Inasmuch as petitioners charge the Court of Appeals with a holding not actually rendered, the conclusions they seek to draw are necessarily fallacious. Even a cursory examination of the opinion discloses that the normal canons of construction were utilized in interpreting the lease. The Court examined the actions and conduct of the parties themselves in reference to this lease; the interpretation placed on the lease clause in the past by the parties, the testimony during the trial, and even the admissions made by petitioners' counsel during the trial. The Court then concluded by stating:

> "In this case we think there was such ambiguity in the provision of the lease giving the defendant the right to make such changes and alterations in the premises as it found necessary for its purpose that the Court must determine the proper interpretation of the lease. The trial court interpreted the lease as not giving the defendant permission for the 1952 construction work. We think that interpretation under all of the facts and circumstances of this case was clearly erroneous. We hold that the defendant under the terms of this lease was permitted to do the 1952 construction work without notice to the plaintiffs and without obtaining any further consent from the plaintiffs." (App. B, pp. 17a-18a).

Since only a question of judicial construction of a particular lease clause was considered by the Court of Appeals, it is clear that this decision did not create new law in the field of landlord and tenant.

2. There is no conflict between the opinion of the Court of Appeals and all applicable State Court decisions.

(a) Inasmuch as the decision in this case is a judicial interpretation of a specific lease clause *predicated upon the particular facts involved,* all cases involving different

factual situations and lease clauses are clearly not in point. Petitioners have failed to set forth a single case from any jurisdiction where a contrary result was reached under a similar set of facts. Therefore, no conflict can exist between the instant holding and other decisions.

(b) Moreover, petitioners themselves admit that the Court of Appeals' decision was based in part upon a decision of the Illinois Supreme Court. All of the cases presented by petitioners to this Court were examined and distinguished by the Court of Appeals.

B. The Court of Appeals has correctly decided this case.

An examination of the findings in the record clearly shows that petitioners failed to prove their case. They charge that the construction work of the respondent had not been carried out in a workmanlike manner and had depreciated the value of the demised premises. On this point the Court of Appeals stated:

> "The trial court failed to find, as contended by plaintiffs, that the addition was not constructed in a workmanlike manner; and the court's failure to so find for the plaintiffs must be taken as a finding against them on their contention that even though the lease gave the defendant the right to so alter the premises, the construction was not done in a workmanlike manner and therefore violated the provision of the lease." (App. B, p. 11a).

C. The decision in this case affects only these litigants.

Petitioners, as an additional ground for the issuance of a writ, argue that the rights of the Chicago Real Estate Board will be affected by this decision. This is completely erroneous and irrelevant. The Real Estate Board is composed of property owners and real estate brokers and apparently sought to aid the position of

petitioners and is not a party to this suit or involved in any way. Moreover, the Real Estate Board took no further steps after the denial of its petition to intervene by the Court of Appeals.

CONCLUSION.

This case presents no conflict of opinion other than the conflict which always exists when an appellate court concludes that the trial court was in error. The case is invested with no public interest. No important question of law is involved. There has been no departure from the established principles of judicial interpretation of a written document.

The petition represents nothing more than an attempt by the losing party to obtain another appellate review of the judgment against them.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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SHERWIN J. STONE,
Of Counsel.

JUN 21 1956
HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1955.

No. 112

ROSE ROSENBLUM, EDWARD ROWE and HARRIET R. WISE, as Trustees under a Trust Indenture dated November 23, 1942,

Petitioners,

vs.

NEISNER BROS, INC.,

Respondent.

REPLY BRIEF OF PETITIONERS FOR CERTIORARI.

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The Scheffer Press, Inc.—ANdover 3-6850

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1955.

No. 975

ROSE ROSENBLUM, EDWARD ROWE and HARRIET R. WISE, as Trustees under a Trust Indenture dated November 23, 1942,

Petitioners,

vs.

NEISNER BROS, INC.,

Respondent.

REPLY BRIEF OF PETITIONERS FOR CERTIORARI.

I.

THE RESPONDENT HAS FAILED TO STATE A SINGLE COGENT REASON FOR NOT GRANTING THE WRIT OF CERTIORARI.

A. The Respondent Has Not, and Cannot Offer Any Pertinent Authority To Sustain The Decision Below.

It must be obvious from a reading of the brief in opposition to the petition for certiorari that the respondent cannot cite a single authority in support of its position. The two decisions relied on by the Court of Appeals, to-wit, *Fehr Construction Co.* v. *Postl System,* 288 Ill. 634, 642, 124 N.E. 315 (1919), and *Updike* v. *Skillman,* 27

N. J. L. 131 (1858), are not even mentioned by the respondent for the very good reason that they are completely inapplicable to the issues in this case. (See Petition for Certiorari, pp. 7-8.)

B. The Decision Below Announces A New Principle of Law Not Confined to The Particular Facts Involved.

Respondent contends, p. 8, that the decision of the Court of Appeals was "predicated upon the particular facts involved." As pointed out in the petition for certiorari, it is not the function of the Court of Appeals to weigh evidence and to determine questions of credibility in manner contrary to the trial court. The holding in the instant cause, however, was specifically one of law and not of fact. The Court of Appeals expressly stated in its opinion (Appenddix B, p. 13a) that:

> "The plaintiffs' chief contention in this appeal is that the provision of the lease which authorized 'alterations' and 'changes' in the building by the tenant did not permit 'additions' to the building such as the construction of the additional storage unit in 1952. We agree with the plaintiffs that if the lease did not authorize this construction work, such work constituted waste, and the fact that it enhanced the value of the plaintiffs' property does not constitute a defense." But we cannot agree that this work was not authorized by the lease."

The trial court had found that:

> "From a consideration of all the evidence, it appears that the construction work in 1952 did not enhance the market value of the demised premises but depreciated it, at least from an esthetic view."

The Court of Appeals discarded this finding by differing with the trial court on a question of credibility and by completely ignoring the testimony of the principal witness

for the respondent, who made several admissions damaging to the respondent's cause.

After finding, contrary to the ruling below, that the "addition" enhanced the value of the property, the Court of Appeals concluded that "the fact that [the construction work] enhanced the value of the plaintiffs' property does not constitute a defense." The Court of Appeals then proceeded to decare the novel legal principle that an authorization to make "alterations" and "changes" could be extended to include "additions". This construction of these words of art constituting the subject matter of scores of prior cases, cannot be limited in its scope or effect to the particular facts here involved. It is at variance with all relevant state landlord and tenant cases (See Petition for Certiorari, pp. 6-8). If this case could be limited to "the particular facts involved," the Chicago Real Estate Board would never have attempted to intervene below (See Petition for Ceriorari, pp. 4-5).

C. The Fact That The Premises Are To Be Restored To Their Original Condition Upon The Termination Of The Lease Is No Defense.

Respondent on page 7 of its brief quotes from the decision of the Court of Appeals to the effect that every ambiguity must be decided in favor of the Lessee particularly "where, as here, the lessors were protected against any change in the building which they might not like or approve by the provisions of the lease which require the tenant to restore the premises to the same condition as when received if the lessor should so desire. * * *" The same Court of Appeals has, however, previously held that the fact that the premises may be restored to their original condition upon the termination of the lease is no defense to an act of waste. *Bass* v. *Metropolitan West Side E. R. Co.*, 82 Fed. 857 (C.C.A. 7th 1897). The universal State

court rule is to the same effect. *Agate* v. *Lowenbein*, 57 N.Y. 604 (1874). No authority was cited by the Court of Appeals in support of the sweeping statement quoted above and none exists.

D. The Respondent Has Misrepresented Certain Material Facts.

1. It is not true, as alleged on page 5 of the brief in opposition, that the trial court refused to enter a decree terminating the lease. The actual fact is that the trial court deferred entering the decree of termination until after the notice of default required under the lease could be given. The partial judgment rendered was in conformity with the decision in *American Machine & Metals, Inc.* v. *De Bothezat Impeller Company*, 106 F. (2d) 535 (C.C.A. 2d 1948) in which it was held that the plaintiff could obtain a declaration first and thereafter full relief upon giving the requisite notice of termination.

2. The brief in opposition makes a point of the failure of the Chicago Real Estate Board to take further steps after the denial of its petition to intervene by the Court of Appeals. The probable reason for the present inaction of the Chicago Real Estate Board in this proceeding is to be found in Rule 42 of the Supreme Court of the United States which states that a motion for leave to file as *amicus curiae*, prior to consideration of the jurisdictional question, is "not favored".

3. The brief in opposition refers to certain *interior* remodeling work completed prior to the "addition" in question. All of this work fell within the scope of the authorization to make "alterations" or "changes". But most significantly, the respondent fails to mention that in each of the prior instances the consent of the petitioner

was solicited and obtained (R. 50-51, 81). This fact was stipulated to by counsel for the respondent and is conveniently overlooked in the brief in opposition (R. 81).

4. The statement in the brief in opposition that the petitioners "have failed to set forth a single case from any jurisdiction where a contrary result was reached under a similar set of facts" is overwhelmingly refuted by the contents of the petition for certiorari. See, for example, *Woolworth Co.* v. *Nelson,* 204 Ala. 172, 85 So. 449 (1920).

Respectfully submitted

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